No. 80-620

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners,

v.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

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This Reply Brief is filed pursuant to Rule 22.1.5 of this Court, in order to address certain arguments first raised in Respondents' Brief in Opposition. The non-mention of certain other arguments of respondents does not, of course, indicate our agreement with them.

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ARGUMENT

I.

The Principal Issue is Whether Petitioners are Entitled to the Defense of Judicial Immunity.

Seemingly in an effort to blunt the issue of immunity of the district justices from awards of attorneys' fees, the respondents have sought in the appellate stages of this case to involve the Administrator of the Pennsylvania Courts and his office as an active participant in, if not a party to, this case. The effort may also be directed to supporting the mistaken recital of the Court of Appeals (See Morrison v. Ayoob, 627 F.2d 669, 673, Appendix to the Petition for Certiorari at 8b) that the Administrator (and also the county court administrator) entered an appearance in the district court "and actively participated in all phases of the case," and hence could legally be charged with attorney's fees. This inaccuracy of the Court of Appeals, and the faulty conclusion

drawn therefrom, is treated in part IV of the Petition for Certiorari at 57 et seq., and especially at 60-61, and will not be here repeated.[1] In short, the present

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[1] Respondents feel compelled to reply to some of the misstatements of fact contained in the Brief in Opposition:

1. On page 3, first paragraph, it is stated that the motion to dismiss the § 1983 action below was filed by Jonathan Vipond, III, "a staff attorney for the Administrative Office of the Pennsylvania Courts." The motion to dismiss therein referred to was in fact filed on behalf of the defendant district justices by their lawyer, who was Mr. Vipond, whose appearance had been entered on behalf of the district justices. Mr. Vipond did not appear for the Administrative Office of the Pennsylvania Courts; neither that office nor the Administrator himself, Judge Alexander F. Barbieri, was a party to or entered an appearance in the proceeding.

2. Footnote 2 on page 3 of the Brief in Opposition is in error in stating that the "Administrative Office" advanced any ground for action or took any position in the trial court; the Administrative Office did not take part in the proceeding.

3. On page 5, second paragraph, it is stated that respondents sought attorney fees and other costs "against the Administrative Office which supervises the defendants [petitioners here] and which had also defended the district justices throughout the underlying proceedings." Our response to this misstatement is twofold:

a. First, there is no evidence and it is not true that the Administrative Office supervises

(FOOTNOTE 1 CONTINUED)

FOOTNOTE 1 CONTINUED

the defendant district justices. Neither is it true that said office had defended the justices in the § 1983 proceedings. The defendant justices were represented by two lawyers who entered appearances for the several defendants; that the lawyers were employed by the state and county administrative offices, respectively, did not mean that those offices were in the case in any fashion.

b. Second, it is not true that fees were sought by respondents against the Administrative Office. As stated in the Petition for Certiorari at 18, the motion for fees and costs pursuant to § 1988 contained no indication of the party or parties from whom the fees were sought.

4. Footnote 3 on page 5 of Respondents' Brief in Opposition states that Mr. Vipond in his capacity as staff attorney for the Administrative Office of the State Courts "assumed primary responsibility for defending the conduct of the district justices." Again, two observations are to be made in response to this erroneous assertion:

a. The quoted statement is misleading and untrue; what had been the conduct of the defendants was never ascertained, for the § 1983 case was never tried. The district judge's suggestion at 21a, referred to by Respondents in support of their quoted statement, was mistaken, as the record will show. Mr. Vipond corrected the court's misapprehension at first opportunity, stating, "we are not here to defend any improper practices, unconstitutional or on a lesser level. . . ." [67a]

b. Mr. Vipond entered his appearance as attorney for the district justices, not as representing the State Court Administrator.

5. On page 6, line 3, of the Brief in Opposition it is stated the issue of judicial immunity was raised by "the Administrative Office." On the contrary, it was raised by the defendant district

(FOOTNOTE 1 CONTINUED)

petitioners were the only parties defendant below. Their lawyers, Messrs. Vipond and Taylor, were employed by the state and county administrative offices, respectively, but the lawyers' appearances were only for the defendants. It is the liability of those judicial officer defendants, and only those persons, for attorney fees, which is at issue on this appeal; that the state, county, or one or the other court administrator may be directed to discharge that liability is beside the point on the issue of judicial immunity vel non.

FOOTNOTE 1 CONTINUED

justices; the administrative office did not take part in the proceedings.

6. Under part IV of the Brief in Opposition, at page 35, the statement is made, without citation of source, that "the State Court Administrator's Office had fully assumed responsibility for the defense of the District Justices." We repeat that this assertion is not supported by the record and is not found in any holding of the District Court. The quotation which follows from the Court of Appeals' opinion is "clearly erroneous," as pointed out in the Petition for Certiorari at 59-60.

II.

The Issue of Judicial Immunity Under § 1988 is Ripe for Determination by this Court in this Case.

Respondents in their Brief in Opposition (Part I A) seek to avoid determination of the immunity issue by arguing that because no award of counsel fees was made by the district court, the issue is not ripe for decision by this Court.

This Court has stated on numerous occasions that it will not decline to review a decision of a lower court solely because some ministerial act remains to be completed upon remand. See, e.g., Johnson v. Muelberger, 340 U.S. 581 (1951); Gulf Refining Co. of Louisiana v. United States, 269 U.S. 125 (1925).

In this case, the Court of Appeals left little leeway for the district court on remand.[2] Clearly, the district court

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[2] The terms of remand are contained in the latter portion of the Court's opinion:

(FOOTNOTE 2 CONTINUED)

has been instructed in no uncertain terms to award fees against petitioners to respondents. The federal question which is at the heart of the petition -- whether the doctrine of judicial immunity protects judicial officers acting in their judicial capacity from awards of attorney's fees

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FOOTNOTE 2 CONTINUED

> "Because the district court proceeded on an erroneous legal premise as to how the award might be framed, we feel it would be better for the district court to consider these arguments in the first instance.
>
> We hold that judicial immunity is not a factor to be considered under § 1988. We will remand to the district court to consider in the first instance the proper framing of the award of attorney's fees. We also note that the parties have stipulated the amount of fees and have raised no issue concerning this on appeal. We leave to the district court whether it nevertheless desires to amplify the record to determine the reasonableness of the fee. We also leave open whether the plaintiffs may recover fees in connection with this appeal."

627 F.2d at 673, Appendix to the Petition for Certiorari at 8b.

under 42 U.S.C. § 1988 (Supp. 1980) -- has been finally decided by the circuit court. All that remains for the district court to do is to determine which entity, among a very limited selection of possibilities, is to bear the brunt of the award.[3] However the district court may decide to "frame the award," as the circuit court directed, it is unquestionable that an award is to be made and that it will be based on the alleged misconduct of the petitioners.

In this setting no policy relating to the review of final decisions will be weakened by this Court's accepting review. On the contrary, to characterize this case as non-final would engender a needless waste of time for litigants and judges alike. Furthermore, it is difficult to

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[3] The circuit court also appears to have given the district court some freedom to determine the amount of the award. This freedom may be of limited value since petitioners stipulated in the trial court that the amount of fees requested by respondents was reasonable.

see how, after the remand, petitioners could again bring the issue of judicial immunity before this Court. After the district court's decree, it would not be open to petitioners to appeal the issue of judicial immunity to the Third Circuit Court of Appeals, for that has already been done and that court has already decided the issue. Under the circumstances, the issue of judicial immunity is ripe for decision by this Court now.

III.

The Existence of § 1988 Judicial Immunity is not Dependent on § 1983 Immunity.

The respondents seek to avoid consideration by this Court of whether judges are immune from fee awards under § 1988 for the reason that the case does not also raise the issue of whether judges are immune from suit under 42 U.S.C. § 1983 (Supp. 1980).

They argue that "[t]he propriety of a fees award under § 1988 in the face of a judicial immunity claim cannot be determined

except by an assessment of that claim with respect to the underlying action under 42 U.S.C. § 1983." (Respondents' Brief in Opposition at 12.) It is asserted that immunity from injunctive relief under § 1983 is "the predicate" to immunity under § 1988 (ibid. at 15), and has not been established.

Respondents are mistaken in believing that Supreme Court of Virginia v. Consumers Union of the United States, _____ U.S. _____, 100 S. Ct. 1967 (1980), stands for the above proposition. Although the language in the opinion in Consumers Union, as quoted in the Brief in Opposition at 12-13, may be read as intimating the validity of the respondents' notion, the issue was not strictly presented or decided in that case. As stated in our Petition for Certiorari at 37-38 n. 13, there are strong reasons for holding that a judge should be held immune from the onus of attorney's fees under § 1988 notwithstanding that he may be subject

to an injunctive decree under § 1983.[4] The rationale for such a holding becomes clear if the artificiality of the distinction between damages and attorney's fees is recognized, for this Court has, on numerous occasions, reaffirmed the immunity of judges from damage awards. Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967).

Finally, we point out that the dismissal of the § 1983 action for mootness also rendered moot any immunity defense to that claim. Furthermore, once the action was mooted, there was no way by which petitioners could have preserved the § 1983 immunity question for appellate review. Thus the effect of respondents' argument is that because the § 1983 action was mooted, the defense of judicial immunity can never be asserted against a demand for fees and

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[4] The several briefs of the Amici which have been filed herein cogently make the same point.

therefore is irretrievably lost. This argument is patently erroneous.

IV.

The Issue of § 1988 Judicial Immunity has not been Waived by Petitioners.

Respondents not only argue that the issue of judicial immunity has been raised prematurely because not ripe for this Court's determination, see part II of this Reply Brief, supra, but also that the issue has been raised too late, and so has been waived.

At the outset, we observe that this argument was not made to the district court or the court of appeals and is therefore itself waived. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Moreover, having invoked the circuit court's appellate jurisdiction and obtained a reversal on the merits of the trial court's immunity holding, it is difficult to see how the Respondents can now be heard to say that petitioners are barred from seeking to appeal to this Court on the

same point of law.

Respondents find waiver in the fact that the district justices did not plead immunity as a defense in their Answer to the § 1983 Complaint for injunctive relief. First, petitioners do not concede that immunity from fees must stand or fall with immunity from prospective relief. See Part III, supra, and the Petition for Certiorari at 37-38 n. 13. Thus it was appropriate for the defense to be raised only with regard to the claim for fees. Furthermore, in 1978, at the time that the petitioners were filing their Answer on the merits, there was no indication in the cases, Consumers Union not having then been decided by this Court, that immunity from fees could depend on immunity from suit. If this dependence is indeed established by Consumers Union, petitioners cannot be held to a standard which would require them to have foretold such a development.

Second, petitioners do not agree

that the immunity issue could not have been raised in the § 1983 proceeding (had it not terminated for mootness) although not originally asserted in their Answer. The Answer could have been amended by consent or with leave of court, which, under the federal rules "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). See Foman v. Davis, 371 U.S. 178 (1962). Moreover, under the local rules of court in the Western District of Pennsylvania, the definition of legal issues which can be decided before trial is handled in pre-trial proceedings at which the governing documents relative to facts and law are the parties' respective "narrative statements." Thus under the practice in this federal district, the legal issue of the applicability of the doctrine of judicial immunity could have been raised at that stage. See Rule 5 II, F and J of the Rules of Court of the United States District Court for the Western District of Pennsylvania, promulgated and effective

June 13, 1977, included in the appendix hereto.[5]

Finally, the fee request properly engendered a completely collateral proceeding in the lower court. Different issues were involved, and a separate hearing was required. Therefore, the petitioners should not be precluded from raising in the collateral proceeding on fees additional defenses appropriate to that proceeding. It would be manifestly unfair to require a litigant to foresee and to plead at the initial pleading stage all relevant facts and possible defenses which he may wish to raise in a subsequent fee proceeding.

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[5] Under the federal rules, certain defenses are waived if not raised either by motion or responsive pleading or an amendment permitted under Rule 15(a) as a matter of course. See Rule 12(h)(1). The defense of official immunity, however, is not one of them. The waived defenses are jurisdiction over the person, improper venue, insufficiency of process or of service of process.

V.

This Court's Decision in New York Gaslight Club, Inc. is not Authority for Awarding Fees under § 1988 to Litigants who Incurred no Such Fees.

In part II of the Petition for Certiorari we argued that neither a past decision by the Third Circuit Court of Appeals (Rodriquez v. Taylor, 569 F.2d 1231 (3d Cir. 1977)), public policy or the legislative history of § 1988 justified the Court of Appeals in holding that legal fees could be awarded under that section to litigants who in fact incurred no fees. See the Petition for Certiorari at 45-52. Respondents oppose a grant of certiorari to review that holding on the ground that this Court has already decided the point in their favor in New York Gaslight Club, Inc. v. Carey, _____U.S._____, 100 S. Ct. 2024 (1980). That case, however, has no applicability here.

In New York Gaslight Club, Inc., the plaintiff in an action under Title VII of the Civil Rights Act of 1964 was represented

by private counsel who had been employed by the NAACP Special Contribution Fund. The district court dismissed the complaint and later denied an application for legal fees under a statutory provision (§ 706(k)) which is in substantially the same language as § 1988. One of the reasons for its holding was that the New York State Division of Human Rights (Division) would have supplied an attorney to present the complaint to the hearing examiner without charge. The Court of Appeals for the Second Circuit reversed the denial of an award for counsel fees, and this court affirmed.

The narrow question presented on appeal, as stated by Mr. Justice Blackmun for the majority, was whether the plaintiff below was a "prevailing party" in an "action or proceeding under this title"; the Court answered affirmatively. Among its other holdings this Court stated that the availability of a Division attorney was not a "special circumstance" which should deprive

a prevailing complainant of a fee award, since it was clear, for reasons fully described by the Court, that "the Division employee does not take the place of private counsel." ____U.S. at _____, 100 S. Ct. at 2033. The Court was influenced by its conclusion that Congress intended to increase the availability of private counsel in Title VII actions. In the case at bar, unlike the situation in Gaslight, no private lawyer was retained and no legal fees were incurred.[6] Similarly distinguishable is Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976),

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6 In footnote 9 of the opinion in Gaslight, by way of dictum (the point had not been raised in the petition for certiorari), the majority rejected the petitioner's (employer's) argument that the respondent's representation by a "public interest group" was a "special circumstance" that should result in denial of counsel fees. _____U.S. at _____, 100 S. Ct. at 2034, n.9. Apparently, the Petitioner argued that the respondent's lawyer's affiliation with or employment by the NAACP Fund somehow served to disqualify him or her as an attorney whose fee could be recovered by a prevailing litigant under § 706(k) of the Civil Rights Act of 1964. This is not the argument made by us in the present case, where respondents' attorneys were paid with public funds by way of salary and respondents were charged with no fees whatsoever.

and other pre-§ 1988 cases upon which the Respondents also rely. In short, the important issue posed in part Il of the Petition for Certiorari has not been decided by this Court and should be decided in the context of this case.

CONCLUSION

We respectfully reiterate our conviction that this Court's writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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December 31, 1980

APPENDIX

Rule 5 of the Local Rules of Court of the United States District Court for the Western District of Pennsylvania, effective June 13, 1977.

RULE 5. CIVIL ACTIONS: PRETRIAL: IMPARTIAL MEDICAL EXAMINATION.

I. Where it appears from the complaint, petition or other pleading that the cause of action arose in one of the following counties: Crawford, Elk, Erie, Forest, McKean, Venango or Warren, and either the plaintiff or defendant resides in one of said counties, the Clerk shall give such complaint, petition or other pleading an Erie number and thereafter such case shall be placed upon the Erie calendar of the Court; all other cases or matters for litigation shall be docketed and processed at Pittsburgh. Any complaint, petition or other pleading or document for an Erie case must be filed in duplicate.

II. Pre-Trial Procedure.

A. There will be a pretrial on every civil case, unless counsel for the parties stipulate in writing to the contrary and approval is given by the judge.

B. Non-jury cases shall be pretried in accordance with an Order by the judge to whom the case has been assigned.

C. In all civil cases involving personal injuries, the following pretrial procedures shall apply when invoked by written notice from the judge to whom the case has been assigned or from the Clerk to counsel of record.

1. All discovery, including medical examinations, which is authorized by the Federal Rules of Civil Procedure shall be completed within 50 days after pretrial has been invoked. Additional medicals will be allowed but only upon Order of Court or written stipulation of the parties. Any other supplemental discovery or extension of time may only be granted after written motion and Order of Court.

2. Within 60 days after pretrial has been invoked, counsel for the plaintiff shall serve a narrative written statement of the facts that will be offered by oral or documentary evidence at trial upon all counsel of record and file a copy with the Clerk of Court. There shall be attached to said written statement:

(a) A copy of all reports containing findings or conclusions of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and whom a party expects to call as a witness at the trial of the case. If timely production of any such report is not made, the testimony of such physician shall be excluded at the trial, except upon consent of the other party or parties.

(b) A copy of all reports containing the substance of the facts, findings, opinions and a summary of the grounds or reasons for each opinion of any expert whom a party expects to call as a witness at the trial. If timely production of any such report is not made, the testimony of such expert shall be excluded at the trial, except upon consent of the other party or parties.

(c) The name and address of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and the name and address of any other expert who has been consulted in connection with the matters involved in the case, together with an authorization to all other parties to interview said physician or other expert, examine his pertinent records, and obtain a report in connection with such injuries or other matters.

(d) Names and addresses of all witnesses the plaintiff expects to call. Said witnesses shall be classified as liability, medical or condition witnesses.

(e) Written authorization to inspect hospital records where plaintiff may have been examined, treated or hospitalized.

(f) The written statement shall set forth a specific statement of all items of special damages, the amounts thereof, the method of computation and a summary of the evidence to be offered in support thereof, together with copies of any exhibits or documents or expert witness reports by which such damages are to be proven.

3. Within 70 days after pretrial has been invoked, counsel for the defendant shall serve a narrative written statement of the facts that will be offered by oral or documentary evidence as a defense at trial upon all counsel of record and file a copy with the Clerk of Court. There shall be attached to said written statement:

(a) A copy of all reports containing findings or conclusions of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and whom a party expects to call as a witness at the trial of the case. If timely production of any such report is not made, the testimony of such physician shall be excluded at the trial, except upon consent of the other party or parties.

(b) A copy of all reports containing the substance of the facts, findings, opinions and a summary of the grounds or reasons for each opinion of any expert whom a party expects to call as a witness at the trial. If timely production of any such report is not made, the testimony of such expert shall be excluded at the trial, except upon consent of the other party or parties.

(c) The name and address of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and the name and address of any other expert who has been consulted in connection with the matters involved in the case, togehter with an authorization to all other parties to interview said physician or other expert, examine his pertinent records, and obtain a report in connection with such injuries or other matters.

(d) Names and addresses of all witnesses the defendant expects to call. Said witnesses shall be classified as liability, medical or condition witnesses.

4. Within 80 days after pre-trial has been invoked, counsel for the third party defendant shall serve a narrative written statement of the facts that will be offered by oral or documentary evidence at the trial upon all counsel of record and file a copy with the Clerk of Court. There shall be attached to said written statement:

(a) A copy of all reports containing findings or conclusions of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and whom a party expects to call as a witness at the trial of the case. If timely production of any such report is not made, the testimony of such physician shall be excluded at the trial, except upon consent of the other parties.

(b) A copy of all reports containing the substance of the facts, findings, opinions and a summary of the grounds or reasons for each opinion of any expert whom a party expects to call as a witness at the trial. If timely production of any such report is not made, the testimony of such expert shall be excluded at the trial, except upon consent of the other parties.

(c) The name and address of any physician who has treated, examined, or has been consulted in connection with the injuries complained of, and the name and address of any other expert who has been consulted in connection with the matters involved in the case, together with an authorization to all other parties to interview said physician or other expert, examine his pertinent records, and obtain a report in connection with such injuries or other matters.

5. (a) Counsel shall make available to opposing counsel for inspection and copying all exhibits which he expects to offer in evidence. Counsel shall mark all exhibits which he expects to offer in evidence. At the pretrial conference, each counsel shall submit to the Court a written list of all exhibits which he expects to offer in evidence. This list shall contain the identifying mark of each exhibit, together with a brief description thereof. It shall be indicated on the written list (1) those exhibits which are to be admitted into evidence by stipulation, (2) as to any exhibit not so stipulated, the grounds for objection, briefly stated, (3) those exhibits to which there is agreement of authenticity and waiver of formal proof, but general objections reserved, and (4) those exhibits which have been marked only for identification and formal proof of authenticity is demanded.

(b) Counsel shall explore the possibility of an amicable settlement and are requested to consult with their clients prior to the conference in order that they shall have authority to compromise the case if a settlement is possible.

(c) Trial counsel, or substitute counsel having full authority to act on behalf of trial counsel, must attend the pretrial conference.

6. One week prior to the actual date of pretrial counsel for the parties shall file with the Court a brief on any disputed question of law.

D. The procedure outlined in paragraph C, insofar as applicable shall be followed in all civil jury cases, but a judge may provide for a special pretrial procedure in any case assigned to him.

E. The judge shall cause a record to be made of the facts and matters agreed upon at the pretrial conference. The record of the pretrial shall be deemed the pretrial order, except that the judge may enter a separate order. The Court may compel agreement as to undisputed facts. Counsel must object to or be deemed to have accepted the pretrial record and any order of the judge entered therein.

F. The Court, at the pretrial conference, may consider motions to continue, to amend, to consolidate, or to sever.

G. Failure to fully disclose in the pretrial narrative statement or at the pretrial conference the substance of the evidence as to liability, defenses, and damages proposed to be offered at the trial, will result in exclusion of that evidence at the trial. The only exceptions will be (1) matters which the Court determines were not discoverable at the time of the pretrial conference, (2) privileged matter, and (3) matter to be used solely for impeaching purposes.

H. When a case is listed for pretrial, it shall not be continued except for just cause. If there is a failure to comply with the pretrial rules, the Court may effect such penalties and sanctions as in the judgment of a judge the circumstances warrant, which may include the dismissal of the plaintiff's cause of action, or the

granting of permission to proceed ex parte, and barring any defendant who fails to comply from offering any testimony. If all parties fail to comply, the action may be dismissed.

I. At the pretrial conference, the Court may inquire as to the possibility of settlement. Any discussion pertaining to settlement shall not be a part of the pretrial order nor be permitted to be used in the trial of the case or any arguments or motions relating thereto. The Court may direct a record to be made of settlement discussions to be available upon order of the Court.

J. After a case has been pretried, no amendment to any pretrial statement or other pleading shall be presented to the Clerk for filing unless authorized at the pretrial conference. Otherwise a party may amend only by leave of the Court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

III. Impartial Medical Examination, Report and Testimony.

A. In any case involving the medical condition of a party, a judge on his own motion, for any reason including assistance in pretrial proceedings or in further settlement, or by agreement of the parties or by an affidavit by one of the parties setting forth the need, may refer the case to an impartial medical expert. The expert will be a member of a panel of examining physicians designated by the Allegheny County Medical Society after consultation with a committee appointed by the President of the Allegheny County Bar Association, and which panel shall include specialists in the various medical fields.

B. Copies of all available medical reports or hospital records shall be furnished by counsel to the medical expert who shall review them, examine the party and forward his report and opinion to the judge, with copies to counsel for each of the parties. As part of his report, the medical expert shall answer the following question:

> Considering all the facts presented, and based on your examination of the party, is the proposed medical testimony of any doctor who may be called as a witness in this case such that in the present state of medical science a reasonable medical scientist could not accept it either as to diagnosis, causal connection or prognosis?

C. If the answer to this question is "Yes" and the case proceeds to trial, the medical expert may be called as a witness by the judge or by any party to the action as an impartial medical expert appointed by the judge and his testimony submitted to the jury under proper instruction from the judge.

D. If the answer to this question is "No", the medical expert may be called as a witness by any party to the action, but he shall not be identified as having been appointed as an impartial medical expert.

E. If the case does not proceed to trial or if the medical expert is not called as a witness at the trial, or is called as a witness by the judge, his compensation shall be paid equally by each party to the litigation, unless the judge in his discretion orders payment to be made otherwise in order to meet special factual situations.

F. If the medical expert is called as a witness at the trial by any party, his compensation shall be paid by that party.

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 1980, three copies of the within Reply Brief were mailed, postage prepaid, to Timothy P. O'Brien, Esquire, counsel for Respondents, Neighborhood Legal Services Association, 10th Floor, Allegheny Building, 429 Forbes Avenue, Pittsburgh, Pennsylvania 15219. I hereby further certify that all parties required to be served have been served.

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